IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-887

LENDALL B. TERRY,

Petitioner,

vs.

INDIANA SUPREME COURT DISCIPLINARY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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PRAYER

The petitioner, Lendall B. Terry, respectfully prays that a Writ of Certiorari issue to review the Judgment and Order entered by the Supreme Court of the State of Indiana on September 10, 1979, ordering that, by reason of misconduct found under certain counts of a Verified Supplemental Complaint for Disciplinary Action, the petitioner be disbarred as an attorney in the State of Indiana.

OPINION BELOW

The opinion of the Supreme Court of the State of Indiana, not yet reported, ordering the disbarment of the petitioner, is attached hereto and appears as Appendix A.

STATEMENT OF JURISDICTION

On September 10, 1979, the petitioner, Lendall B. Terry, was disbarred as an attorney in the State of Indiana by the Supreme Court of Indiana. In so doing, the Supreme Court adopted the Findings of a Hearing Officer that the petitioner had violated the Code of Professional Responsibility and his oath as an attorney in two respects:

1. On several occasions the petitioner asserted in correspondence directed to public officials and members of the Bar of the State of Indiana that a Justice of the Indiana Supreme Court had conspired with attorneys and other unspecified individuals to conceal and cover up the alleged criminal activities of a Ripley County attorney, which allegations were made without any proof; and

2. The petitioner delivered materials to prospective members of the Ripley County Grand Jury containing the petitioner's assertions that an attorney was involved in criminal activity, and that a judge *pro tempore* and

the County Prosecutor were covering up this alleged activity.[1]

This Court's jurisdiction is invoked under Rule 22(3) of the Rules of this Court, 28 U.S.C. 2101(c), and 28 U.S.C. 1257(3); in that the petitioner's activities which resulted in his disbarment were protected by the First and Fourteenth Amendments to the Constitution of the United States. This Petition for a Writ of Certiorari has been filed within 90 days of the Supreme Court of Indiana's entry of a final order disbarring the petitioner.

QUESTION PRESENTED

1. Whether an attorney may be disbarred or otherwise disciplined as a result of his making accusations of criminal conduct against a Justice of the Indiana Supreme Court; which accusations were made without legal proof, but with a reasonable belief, based upon objective facts and circumstances, that the charges were, or could be true.

[1] The Findings of the Hearing Officer are attached hereto as Appendix B, and the Supplemental Verified Complaint for Disciplinary Action is attached hereto as Appendix C.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part, as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Article 7, Section 10 of the 1851 Constitution of Indiana provides, in relevant part, as follows:

> *Selection of Justices of the Supreme Court and Judges of the Court of Appeals.*—A vacancy in a judicial office in the Supreme Court or Court of Appeals shall be filled by the Governor, without regard to political affiliation, from a list of three nominees presented to him by the judicial nominating commission. If the Governor shall fail to make an appointment from this list within sixty days from the day it is presented to him, the appointment shall be made by the Chief Justice or the acting Chief Justice from the same list.

Article 7, Section 11 of the 1851 Constitution of the State of Indiana provides, in relevant part, as follows:

> *Tenure of Justices of Supreme Court and Judges of the Court of Appeals.*—A justice of the Supreme Court or judge of the Court of Appeals shall serve until the next general election following the expiration of two years from the date of appointment, and subject to approval or rejection by the electorate, shall continue to serve to terms of ten years, so long as he retains his office.
>
> * * *
>
> On recommendation of the commission on judicial qualifications the Supreme Court may (1) retire such justice or judge for disability that seriously interferes with the performance of his duties and is or is likely to become permanent and (2) censure or remove such justice or judge, for action occurring not more than six years prior to the commencement of his current term, when such action constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

STATUTORY PROVISIONS INVOLVED

Rule 22 of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys as amended February 15, 1954, provides as follows:

OATH OF ATTORNEYS

Upon being admitted to practice law in the state of Indiana, each applicant shall take and subscribe to the following oath or affirmation:

"I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself; I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed; I will abstain from direct or indirect solicitation of employment, to institute, prosecute, or defend against any claim, action or cause of action; so help me God."

Rule 23 of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys provides, in relevant part, as follows:

Section 1. General Principles

Each person granted the privilege to practice law in this State has the obligation to conduct himself at all times in a manner consistent with the trust and confidence reposed in him by this Court and in a manner consistent with his duties and responsibilities as an officer or judge of the courts of this State. This Court has exclusive jurisdiction of all cases in which an attorney who is admitted to the Bar of this Court or who practices law in this State [hereinafter referred to as "attorney"] is charged with misconduct. The procedures hereinafter set forth shall be employed and construed to protect the public, the court and the members of the Bar of this State from misconduct on the part of attorneys and to protect attorneys from unwarranted claims of misconduct.

Section 2. Grounds for Discipline

Grounds for discipline and disciplinary action shall be conduct that violates the Code of Professional Responsibility and the Code of Judicial Conduct and Ethics heretofore adopted by this Court as well as the standards or rules of legal and judicial ethics or professional responsibility adopted from time to time by this Court.

Section 3. Types of Discipline

(a) One of the following types of discipline may be imposed upon any attorney found guilty of misconduct: permanent disbarment from the practice of law subject to reinstatement as hereinafter provided; suspension for a definite or an indefinite period from the practice of law subject to reinstatement as hereinafter provided; a public reprimand; or a private reprimand. Amended Nov. 30, 1971.

(b) Notice of permanent disbarment, suspension or public reprimand shall be communicated to the parties to the proceeding, the Clerk of this Court, the Clerk of each of the Federal District Courts in this State, the Clerk of the Court and Bar Association of each county in which the attorney maintains an office, the Clerk of the Court and Bar Association of each contiguous county, a newspaper of general circulation in each county in which the attorney maintains an office, the official publication of the Indiana State Bar Association, and the American Bar Association. Notice of private reprimand shall be communicated to the parties to the proceeding and the Clerk of this Court.

* * *

Section 10. Investigatory Procedures

(a) Upon receipt of a written, verified claim of misconduct [hereinafter referred to as "the grievance"], from a member of the public, a member of this Bar or a member of the Commission and completion of such preliminary investigation as he deems appropriate, the Executive Secretary shall:

1. Dismiss the claim, with the approval of the Commission, if he determines that it raises no substantial question of misconduct; or
2. If he determines that it does raise a substantial question of misconduct, send a copy of the grievance by certified mail to the attorney against whom the grievance is filed [hereinafter referred to as "the respondent"] and shall request a written response within twenty [20] days after the respondent receives a copy of the grievance.

In the event of a dismissal as provided herein, the person filing the grievance and the respondent shall be given written notice of the Executive Secretary's determination. In the event of a determination that a substantial question exists, the matter shall proceed to (b) hereinafter. Amended Nov. 30, 1971.

(b) Thereafter, within forty-five [45] days, after notice to the respondent, if the Executive Secretary, upon consideration of the grievance, the preliminary investigation and any response from the respondent, determines there is a reasonable cause to believe that the respondent is guilty of misconduct the grievance shall be docketed and investigated. If he determines that no such reasonable cause exists, the grievance shall be dismissed with the approval of the Commission. In either event, the person filing the grievance [hereinafter referred to as "the complainant"] and the respondent shall be given written notice of the Executive Secretary's determination.

(c) If the grievance is docketed, for investigation, the Executive Secretary shall conduct an investigation of the grievance. Upon completion of the investigation the Executive Secretary shall promptly make a report of the investigation and his recommendations to the Commission, at its next meetings.

* * *

Section 12. Prosecution of Grievances

(a) In the event the Commission determines that the misconduct, if proven, would warrant disciplinary action the Executive Secretary shall prepare a verified complaint which sets forth the misconduct with which the respondent is charged and shall prosecute the case.

(b) The complaint shall be entitled "In the matter _____", naming the respondent. Six [6] copies shall be filed with this Court. The complaint may be verified on information and belief, and shall be served as in civil actions upon the respondent and the complainant promptly after filing. If the respondent cannot be found, this Court will, upon a proper showing, direct notice to be given by publication as in civil actions.

Section 13. Hearing Officers

In addition to the powers and duties set forth in this Rule, hearing officers shall have the power and duty to:

(a) conduct a hearing on the complaint of misconduct within sixty [60] days after the Commission's determination of reasonable cause;

(b) administer oaths to witnesses;

(c) receive evidence and make written findings of fact and recommendations to the Court; and

(d) do all things necessary and proper to carry out their responsibilities under this Rule.

Section 14. Proceedings before the Hearing Officers

(a) The rules of pleading and practice in civil cases shall not apply. No dilatory motions shall be entertained. The case shall be heard on the complaint and an answer which may be filed by the respondent within thirty [30] days after notice of the filing of the complaint. An answer, if filed, may assert any legal defense. If the respondent shall elect to file an answer, he shall file six [6] copies with this Court. An answer need not be filed, in which case the complaint shall be taken as denied. A respondent may on a showing of good cause petition for a change of hearing officer within ten [10] days after the appointment of such hearing officer.

(b) The complainant and the respondent shall be given not less than fifteen [15] days written notice of the hearing date. The respondent shall have the right to attend the hearing in person, to be represented by counsel, to cross-examine the witnesses testifying against him and to produce and require the production of evidence and witnesses in his own behalf, as in civil proceedings.

(c) The proceedings may be summary in form and shall be without the intervention of a jury and shall be reported.

(d) Within thirty (30) days after the conclusion of the hearing, the hearing officer shall determine whether misconduct has been proven by preponderance of the evidence and shall submit to the Supreme Court written findings of fact deduced by him from the evidence. The hearing officer may submit recommendations concerning the disposition of the case with his findings of fact, but such recommendations shall be given only such weight by the court as it believes to be consistent with a paramount consideration of uniformity of discipline throughout the state. A copy of said findings and recommendations, if any, shall be served by the hearing officer on the respondent and the executive secretary of the Disciplinary Commission, at the time of filing the same with the Supreme Court. This rule shall be effective on and after its adoption. Amended eff. March 14, 1973.

(e) If there has been a determination of reasonable cause as set forth under 11(c), and if the complaint states facts constituting such reasonable cause, the hearing officer or officers may, upon motion of the Disciplinary Commission, issue a rule against the respondent to show cause why he should not be suspended pending final determination of the cause and fixing a time and place certain for hearing thereon, which shall be not less than fifteen [15] days after service of notice thereof, if by personal service, and not less than twenty [20] days after mailing, if by certified or registered mail. Procedure at the hearing upon such rule to show cause shall be the same as provided herein for hearing upon the complaint and answer, except the burden of proof shall be upon the respondent. If the complaint, in the opinion of the hearing officer or officers, shall fail to sustain such burden of proof, the hearing officer or officers shall submit to this Court a written recommendation whether or not the respondent be suspended pending final determination of the cause.

Section 15. Supreme Court Review

(a) The respondent, complainant or Commission shall have thirty [30] days after the filing of the hearing officers finding and recommendation to petition for a review of the same before the Supreme Court. If no petition for review is filed within thirty [30] days of the finding and recommendation of the hearing officer the Supreme Court shall enter judgment or such other appropriate order in the premises.

(b) Upon receipt of written recommendation for suspension, pending final determination of the cause, this Court may forthwith enter an order of suspension thereon. Respondent shall have fifteen [15] days thereafter to petition this Court for a review and a dissolution of such order.

(c) In the event that this Court grants a petition under this Section 15, briefs may be filed and oral arguments heard, as the Court shall determine. Such briefs need not conform to the rules of this Court. Upon a review the Court shall determine whether the findings and recommendations of the hearing officer or officers are supported by sufficient evidence and shall enter its judgment, with or without opinion as the Court shall determine.

* * *

Section 20. Immunity

Each person shall be immune from civil suit for all of his sworn or written statements, made without malice, and intended for transmittal to the Commission, the Executive Secretary, or his staff, or made in the course of investigatory, hearing or review proceedings under this Rule. Sworn or written statements made to others which are not intended for such transmittal have no immunity under this Section. The Executive Secretary, his staff, counsel, investigators, hearing officers, and the Commissioners shall be immune from suit for

any conduct arising out of the performance of their duties.

* * *

Section 22. Public Disclosure

Prior to final disposition of a grievance, the Commission or the Executive Secretary, or the Clerk of this Court may disclose information which does not relate to the merits of the case to members of the public upon written request, and may disclose information concerning final disposition of a grievance to such persons in all cases except those where the sanction of private censure is imposed. Hearing before the Commission on petitions for reinstatement shall be open to the public. Hearings before the hearing officers or the Commission shall be open to the public in all other cases in the discretion of the Commission or at the request of the respondent.

* * *

Section 24. Rules of Procedure

The Commission may adopt rules and regulations for the efficient discharge of its power and duties. Such rules and regulations shall become effective upon approval by a majority of this Court.

The Indiana Code of Professional Responsibility provides, in relevant part, as follows:

DR 1-102 *Misconduct.*

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.
(2) Circumvent a Disciplinary Rule through actions of another.
(3) Engage in illegal conduct involving moral turpitude.
(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.
(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

* * *

DR 7-108 *Communication with or Investigation of Jurors.*

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.

* * *

DR 8-102 *Statements Concerning Judges and Other Adjudicatory Officers.*

(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

STATEMENT OF THE CASE

The petitioner, Lendall Terry, was the respondent below to a supplemental complaint for disciplinary action filed in the Supreme Court of Indiana by the Disciplinary Commission of that Court, through the Executive Secretary of the Disciplinary Commission.

On January 1, 1973, the petitioner assumed the Bench as the duly elected and qualified Judge of the Ripley Circuit Court, the only Court of general jurisdiction in

Ripley County, Indiana. A complaint was brought against the petitioner by the Disciplinary Commission, charging him both as an attorney and as a judge.

On February 20, 1975, the Indiana Supreme Court handed down an "Opinion on Verified Complaint for Disciplinary Action". In that opinion, the Majority concluded that the petitioner lacked judicial temperament and was, therefore, unfit to occupy judicial office. Judge Terry was suspended, without pay, from the office of Judge of the Ripley Circuit Court.[2]

The majority opinion focused primarily upon a finding that Lendall Terry had, improperly and without probable cause, pursued an attempt to procure an indictment against an attorney practicing before his court for an alleged forgery of the executrix's signature on a petition for allowance of fees in a probate matter.

On June 10, 1975, the Indiana Supreme Court denied a petition for a rehearing in that same cause.

On April 14, 1976, the petitioner filed with the Indiana Supreme Court, a petition to terminate his suspension without pay as a judge of the Ripley Circuit Court. After a full hearing, his petition was denied.

On July 13, 1977, the Indiana Supreme Court Disciplinary Commission filed a "Supplemental Verified Complaint for Disciplinary Action" against the petitioner in four counts.[3]

The Supreme Court of Indiana thereafter appointed a hearing officer who set the matter for public hearing and took evidence and testimony. He filed his "Findings

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[2] *In the Matter of Terry*, 262 Ind. 667, 323 N.E.2d 192 (1975).
[3] That Supplemental Complaint is attached hereto as Appendix C.

of Fact and Conclusions" on December 1, 1978.[4] The Hearing Officer ruled against the petitioner on Counts I and III of the Supplemental Verified Complaint, and recommended that the Indiana Supreme Court impose severe disciplinary action. The two underlying reasons for his recommendation were:

1. Certain allegations made by the petitioner against a justice of the Indiana Supreme Court were totally unfounded, without probable cause and clearly in violation of the Code of Professional Responsibility for Attorneys at Law;[5] and
2. The petitioner communicated with prospective grand jury veniremen and, in effect, advised the venire, without probable cause, that a judge and a prosecuting attorney were participating in the cover-up of the crime of forgery and obstructing justice in the Ripley County Circuit Court; and that the petitioner's action in this regard violated provisions of the Code of Professional Responsibility for Attorneys at Law, and the petitioner's Oath as Attorney.[6]

On September 10, 1979, despite Lendall Terry's argument that all of his statements constituted speech and comment fully protected by the First and Fourteenth Amendments to the Constitution of the United States, the Indiana Supreme Court adopted the Findings of the Hearing Officer and ordered that the petitioner be disbarred as an attorney in the State of Indiana.[7]

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[4] The Findings of the Hearing Officer are attached hereto as Appendix B.

[5] A. 17, 18.

[6] A. 24, 25.

[7] A. 7.

REASONS FOR GRANTING THE WRIT

I.

THE FIRST AMENDMENT RIGHT TO CRITICIZE ALL PUBLIC OFFICIALS WITH IMPUNITY SHOULD BE HELD TO PRECLUDE THE DISBARMENT OF A PRACTICING ATTORNEY AS A RESULT OF HIS MAKING CHARGES AGAINST A JUSTICE OF THE SUPREME COURT OF INDIANA, WITHOUT PROOF, BUT WITH A REASONABLE BELIEF THAT THOSE CHARGES WERE TRUE.

Justices of the Supreme Court of Indiana are not originally elected by the people. That State's Constitution provides that a vacancy on the Supreme Court is filled by the Governor from a list of three nominees presented to him by a judicial nominating commission.[8] The justice so appointed serves "until the next general election following the expiration of two years from the date of appointment, and, subject to approval or rejection by the electorate, shall continue to serve for terms of ten years, so long as he retains his office."[9]

The role of the Indiana electorate, then, is merely to retain or to reject an appointed justice who has already served for at least two years. Inasmuch as judges run unopposed in merit retention elections, and voters rarely vote removal in such elections, an appointment to the Indiana Supreme Court affords the justice virtually a lifetime tenure.[10]

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[8] Constitution of Indiana, 1851, Article 7, Section 10.

[9] *Ibid.*, Article 7, Section 11.

[10] See, e.g., William Jenkins, "Retention Elections: Who Wins When No One Loses?", 61 Judicature 79 (August 1977).

The Constitutional method of removal[11] is properly cumbersome, time consuming, and often ineffective; particularly where the misconduct of a justice has merely been alleged, and the charge has yet to be proved at a hearing. In those situations, the only effective method of determining whether a justice is qualified and worthy to hold his high office remains the verdict of an informed public at the ballot box.

> Whenever the people are well-informed, they can be trusted with their own government; whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights.[12]

The judicial branch of government, though, usually does not act in quite the same glaring arena of public scrutiny as do the legislative and executive branches. That is because legal proceedings, the framework within which courts must operate, often involve extremely complex facts coupled with esoteric concepts of jurisprudence. It follows that the activities and decisions of the Indiana Supreme Court, although vital to the operation of the State government and to the citizens' freedoms, neither excite the attention nor are encompassed by the understanding of most citizens. As a result, the individual voter is compelled to rely for his opinions as to judicial fitness upon the observations of knowledgeable media representatives and other authorities. The judgment of lawyers in this regard is deservedly given great weight by the electorate. Because they are themselves significant members of the very system within which the courts function, practicing attorneys are in a unique position to measure both judicial ability and performance.

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[11] Constitution of Indiana, 1851, Article 7, Section 11.

[12] Thomas Jefferson, Letter to Dr. Price, 1789.

A lawyer, then, must be afforded great freedom to comment, to criticize, and, if need be, to accuse concerning the ability, integrity and actions of judicial officers. Moreover, that freedom must be such that he is not confronted with danger of disbarment or other discipline should he speak out without legal proof of the charges made. The accusation should engender the investigation ultimately to prove the truth or falsity of the charge; but it is unconscionable to prohibit the statement itself until the proof has already been procured. Otherwise, with his very license to practice his profession in the hands of those whom he would charge, only a lawyer possessed of Homeric valor would undertake to criticize or accuse the judiciary.

Are then judges to stand above all other public officials; immune from reasonable, if as yet unproved accusation? Are those who are closest to the day to day operation of the courts, and who therefore possess the greatest knowledge and credibility, to be effectively silenced? Happily for the repose of Americans, the answer is obvious.

We respectfully suggest that the justices of the Supreme Court of Indiana—indeed all judicial officials—are, in the words of Gibbon, "the accountable ministers of the laws."[13] Correspondingly, it is the right and duty of citizens, particularly of those engaged in the legal profession, to call the judiciary to account immediately, loudly and specifically whenever considerations of reason, honor and good sense mandate that action.

A happy, if sometimes unsettling babble of criticism, carping and complaining, both just and unjust, ad-

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[13] Gibbon, "The Decline and Fall of the Roman Empire", Vol. 1, page 61, Heritage Edition (1946).

dressed with fine impartiality against even the loftiest officials of government, forms a universal sign of a truly free people. It is the very essence and spirit of a republican form of government that any citizen who feels aggrieved, even based upon feeble and tenuous suspicion, may publish those grievances and seek redress anywhere, anytime and against anyone.

We submit respectfully that the unfettered right to criticize, and, if it appears necessary, to accuse, as guaranteed by the First and Fourteenth Amendments, applies to the judicial branch of government with vigor equal to that with which the courts so readily apply it to the executive and legislative branches.

> [I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on *all public institutions*. (Emphasis added). *Bridges v. California*, 314 U.S. 252, 270 (1941).

Indeed, we suggest that judges, being, as they are, the principal guardians of the citizen's fundamental right to free speech, should contemplate with serene indifference vicious accusations that might be found actionable if made against others.

One of the most important purposes of the First Amendment has always been to protect the free discussion of all government affairs; and that "includes discussions of candidates, structures and forms of government, the manner in which the government is operated or should be operated, and all such matters relating to political processes."[14]

Certainly then:

> Criticism of government is at the very center of the constitutionally protected area of free discussion.

[14] *Mills v. State of Alabama*, 384 U.S. 214, 218-219 (1966).

> Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.[15]

As a consequence, this Court has traditionally championed the "general proposition that freedom of expression upon public questions is secured by the First Amendment";[16] and statements on a public issue must always be considered:

> . . . against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[17]

Nor need those statements or accusations be proved true before they are made. "First Amendment guarantees have consistently refused to recognize any exception for any test of truth. . . ."[18] So, "factual error affords no warrant for repressing speech that would otherwise be free."[19]

Therefore, even for defamation, a mere tort resulting in money damages, the First Amendment requires a:

> . . . rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[20]

[15] *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).
[16] *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).
[17] *Ibid.*, 376 U.S. at 270.
[18] *Ibid.*, 376 U.S. at 271.
[19] *Ibid.*, 376 U.S. at 272.
[20] *Ibid.*, 376 U.S. at 279-80.

The citizen-critic is constitutionally protected because "it is as much his duty to criticize as it is the official's duty to administer."[21]

On the one hand, this Court has always recognized a State's freedom to select and discipline its own bar; but, on the other hand:

> It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar.[22]

Likewise, a State may not, within the framework of the First and Fourteenth Amendments, apply a more restrictive standard of free speech to a specialized segment of the population, such as legislators, than to private citizens, because:

> [T]he interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators.[23]

And, in this connection, this Court has never allowed either local or federal governments to "deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish."[24]

Furthermore, the barriers erected by this Court to recovery by a public official, even for false statements based upon reasonable belief, have been extended to prohibit a criminal libel action arising out of direct, if

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[21] *New York Times Co. v. Sullivan*, 376 U.S. at 282.

[22] *Konigsberg v. State Bar of California*, 353 U.S. 252, 273 (1957), rehearing denied, 354 U.S. 927.

[23] *Bond v. Floyd*, 385 U.S. 116, 136 (1966).

[24] *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 151 (1967).

veiled suggestions of criminal conspiracy against state court judges.[25] This Court held:

> Where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth.
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> * * *
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> Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.[26]

As in civil libel actions, "actual malice" requires "that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true."[27] Only calculated falsehood, and not merely erroneous statements made in the reasonable belief of their truth may form the basis for even monetary punishment; at least this much should be required to support disbarment.

> [E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive', ...[28]

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[25] *Garrison v. Louisiana*, 379 U.S. 64 (1964).

[26] *Ibid.*, 379 U.S. at 72, 73.

[27] *Ibid.*, 379 U.S. at 74.

[28] *New York Times v. Sullivan*, 376 U.S. at 271-272.

Therefore:

> Only those statements made with *the high degree of awareness* of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions.[29]

Nor is it at all significant that the charges made by the petitioner contained personal attacks on the integrity and honesty of an Indiana Supreme Court Justice:

> Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public reputation. The New York Times rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.[30]

In the case currently before this Court, the statements by the petitioner which triggered his disbarment were made in several letters written by, or on behalf of the petitioner and in a motion prepared and filed by him to disqualify a Justice of the Supreme Court of Indiana and to suspend him from office.[31]

It was never suggested that the letters and other documents were disseminated haphazardly. On the con-

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[29] *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). (Emphasis added)

[30] *Ibid.*, 379 U.S. 64, 77 (1964).

[31] A. 11, Para. 9; A. 16, Para. 10.

trary, some were sent to officers of the Indiana Judges Association and to various law firms in Indiana;[32] some to various Indiana public officials, associations and commissions charged with overseeing the integrity of the bench and bar;[33] and some to members of the Judicial Qualifications Commission.[34] The Motion to Disqualify was presented to the Clerk of the Indiana Supreme Court.

The "false statements", according to both the Indiana Supreme Court Disciplinary Commission and the Findings of the Hearing Officer, consist essentially of the petitioner's allegation that a named Indiana Supreme Court Justice was conspiring with others to use his judicial office in aid of a cover-up of crimes alleged to have been committed by an Indiana attorney, and to protect that attorney from prosecution on criminal charges.

The petitioner openly acknowledged authorship of the letters and of the motion. At the hearing, he reiterated his firm belief that the Supreme Court Justice was indeed a knowing member of the conspiracy to cover up criminal activity by the lawyer. Though admitting he made the statements and caused them to be disseminated, the petitioner consistently asserted that the accusations were made in a reasonable good faith belief, based upon facts and circumstances which were related by him at the hearing, that all of the statements were, or could be true. We respectfully submit that, under those circumstances, the charges by the petitioner constituted protected free speech and fair comment concern-

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[32] A. 16, Para. 10.

[33] A. 16, Para. 11.

[34] A. 16, Para. 12.

ing an elected public official and his fitness for the public office to which he had been appointed and elected.

With respect to even false statements concerning public officials, both civil and criminal libel actions are severely circumscribed by the First Amendment right of citizens to be heard on public affairs. There remains only for this Court specifically and finally to address the question of whether a State may constitutionally limit the right of a lawyer to criticize, and even to accuse the judiciary without proof, when he possesses only a reasonable belief in the truth of the charges he makes. Unless this Court intervenes by granting its Writ of Certiorari, the petitioner will stand disbarred because he was unable to present adequate proof, other than his own reasonable belief, that his charges were true. And all lawyers will in the future speak out on the issue of a judge's integrity or fitness for office only at the risk of forfeiting their licenses to practice law, should they be wrong.

No branch of government should be allowed to become so sensitive of its unsullied dignity as to punish summarily and severely anyone who demonstrates the temerity to critize it. This is particularly true when criticism is directed toward that branch of government which is happily less sensitive to the often contradictory spasms of public censure; but which is, as a consequence, traditionally unanswerable to the direct, informed and frequent opinion of the electorate. If lawyers are to be rendered indolent by fear of retribution, and to contemplate with supine acceptance all judicial acts, then the cable from which depends our liberties is dangerously frayed.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Indiana.

Respectfully submitted,

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APPENDIX A

[Filed September 10, 1979]

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IN THE
SUPREME COURT OF INDIANA

IN THE MATTER OF LENDALL B. TERRY	)	Cause No. 374 S 68

DISCIPLINARY ACTION

PER CURIAM

This cause is before the Court on a supplemental verified complaint filed by the Disciplinary Commission of the Indiana Supreme Court pursuant to Admission and Discipline Rule 23, Section 12. In accordance with the provisions of Rule 23, a Hearing Officer was appointed, a hearing was conducted, and the Hearing Officer has filed his findings. The Disciplinary Commission and the Respondent, each, have petitioned this

Court to review the findings of the Hearing Officer and have submitted briefs in support of their respective arguments. The Respondent has requested oral argument; this request is now denied.

In the supplemental complaint filed under this cause,[1] the Respondent is charged with misconduct under four counts. The Hearing Officer found the evidence insufficient to support findings of misconduct under Counts II and IV of the supplemental complaint. We now adopt and accept as our own the Hearing Officer's findings under Counts II and IV.

In their Petition for Review, the Disciplinary Commission asserts that the Hearing Officer erred in his decision that the doctrine of collateral estoppel did not apply in this cause. The Disciplinary Commission asserts that certain issues raised under the supplemental complaint were resolved by this Court's previous opinion denying a petition for reinstatement filed by the Respondent subsequent to his suspension without pay as the Circuit Judge of the Ripley Circuit Court. The doctrine of *res judicata* is applicable only where there has been a final judgment rendered between the same parties upon the same issues. *Gasaway v. State* (1967), 249 Ind. 241, 231 N.E.2d 513. We do not find a sufficient unity of issues to permit the application of this doctrine.

[1] The Respondent was previously suspended without pay as Judge of the Ripley Circuit Court. *In re Terry* (1975), 262 Ind. 667, 323 N.E.2d 192. The Court concluded that it was not necessary at that time to impose a sanction under the disciplinary rules, even though the Respondent was subject to such considerations. The misconduct alleged in the present matter succeeded the order of suspension from judicial duties and did not form the basis for that order; thus, this proceeding has been denoted as supplemental. The same procedures applicable to all disciplinary actions have been employed in the present proceeding now before the Court.

The Disciplinary Commission further asserts that the Hearing Officer should not have excluded the former, sworn testimony of one Zelmer Norman who was not available to testify at the time of the hearing on the supplemental verified complaint filed in this cause. This former testimony was given at a custody hearing unrelated to the disciplinary action; the Respondent represented the opposing party to Mr. Norman, and as such had an opportunity to cross-examine this witness. However, we find that this is not admissible under the former testimony exception to the hearsay rule, because the Respondent had no motive to develop the testimony by cross-examination. Accordingly, we adopt the Hearing Officer's ruling that the evidence of Mr. Norman should be excluded from consideration.

Under Count I of the Supplemental Verified Complaint, the Respondent is charged with knowingly making a false statement against a judge in violation of Disciplinary Rule 8-102(B) of the Code of Professional Responsibility, with conduct adversely reflecting on his fitness to practice law in violation of Disciplinary Rules 1-102(A)(1) and (6), and with violating his oath as an attorney.

This Court now adopts and accepts as its own the findings of the Hearing Officer entered under Count I which establish that the Respondent was suspended without pay as Judge of the Ripley Circuit Court on June 10, 1975; the opinion in this matter was authored by Justice Donald H. Hunter. Thereafter, on several occasions the Respondent asserted in correspondence directed to public officials of the State that Justice Hunter conspired with attorneys and other unspecified individuals in Ripley County to conceal and cover up the alleged criminal activity of one William Greeman. The

Respondent asserted that such was the motivation of Justice Hunter in entering the order of suspension. The record further demonstrates that these allegations were made without any basis.

With regard to the misconduct charged under Count I, the Respondent asserts in his petition for review that he had reasonable suspicion to believe that a conspiracy had been formed to protect William Greeman and that the misconduct alleged under this Count was constitutionally protected activity. The findings of the Hearing Officer which, as noted above, this Court has adopted dispose of the first issue.

As to the question of constitutional protection, the Respondent argues that his comments and speech were permitted under the First Amendment; it is his further contention that the cases sounding in libel and slander are persuasive and instructive in determining the standard of misconduct to be applied in this case. We do not concur in this analysis.

The Respondent is charged with professional misconduct, not defamation. The societal interests protected by these two bodies of law are not identical. Defamation is a wrong directed against an individual and the remedy is a personal redress of this wrong. On the other hand, the Code of Professional Responsibility encompasses a much broader spectrum of protection. Professional misconduct, although it may directly affect an individual, is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations. In the past, this Court has noted that a disciplinary proceeding stands independent of the course of litigation from which acts of misconduct may arise. *In re Crumpacker*

(1978), ... Ind. ....., ... N.E.2d .....; *In re Wireman* (1977), 367 N.E.2d 1368. This independence is predicated on the unique nature of the interests protected through the disciplinary process.

In the present case, the Respondent is charged with making false accusations against a Judge. This prohibition touches the very core of the judicial process. Unwarranted public suggestion by an attorney that a judicial officer is motivated by criminal purposes and considerations does nothing but weaken and erode the public's confidence in an impartial adjudicatory process.

In view of the above considerations, we now find that the Respondent has violated the Code of Professional Responsibility and his oath as an attorney, as charged under Count I of the Verified Supplemental Complaint for Disciplinary Action.

Under Count III of the Verified Supplemental Complaint, the Respondent is charged with improperly communicating with persons he knew to be members of a venire from which a Grand Jury was to be selected in violation of Disciplinary Rules 7-108(A) and 1-102(A)(1), (5), and (6).

This Court adopts and accepts as its own the findings of the Hearing Officer entered relative to this Count. The findings establish that on June 10, 1975, the Respondent was suspended without pay as Judge of the Ripley Circuit Court; a judge *pro tempore* was appointed in the court. On October 8, 1976, the judge pro tempore, in attempting to qualify twelve prospective grand jurors, learned that all of the prospective jurors had been contacted and given a packet of documents by the Respondent. In the packet, the Respondent included a letter signed by him as "Judge of the Ripley Circuit

Court". The materials delivered to the prospective members of the Grand Jury additionally contained the Respondent's assertions that William Greeman was involved in criminal activity and that the judge pro tempore and prosecutor covered up this alleged activity.

These acts of the Respondent constituted communication with a person known to be a member of the venire from which a jury was to be selected, and conduct prejudicial to the administration of justice adversely reflecting on the Respondent's fitness to practice law. Accordingly, this Court now finds that the Respondent violated the Code of Professional Responsibility as charged under Count III of the Supplemental Verified Complaint for Disciplinary Action.

This Court must now determine the appropriate discipline to be imposed. The Hearing Officer has recommended severe disciplinary action. Our examination of the matters submitted in this cause convinces us that we must concur in this recommendation.

The misconduct present in this case demonstrates either a total disregard or a complete misunderstanding of the purpose for the adjudicatory process. After receiving an adverse ruling in the order of suspension initially entered under this cause, the Respondent chose to undertake an assault directed at the judicial system. His false allegations and assertions, communicated throughout the State, seriously challenged the integrity of the court system and its officers. The record in this case indicates that the motivation behind this assault was personal and not professional. This Court cannot permit such activity to continue or even suggest that the conduct can be tolerated at some future date. The Respondent has shown that he does not deserve the respect of his profession and has further shown that he

is not capable of meeting the ethical restraints placed on all members of the Bar of this State.

In light of the above considerations, this Court now concludes that the strongest sanction available under the Constitution of this State must be employed to preserve the integrity of the legal system. It is, therefore, ORDERED that, by reason of the misconduct found under Counts I and III of the Verified Supplemental Complaint for Disciplinary Action filed under this cause, the Respondent be, and he hereby is, disbarred as an attorney in the State of Indiana.

Costs of these proceedings are assessed against the Respondent.

Hunter, J., Not Participating.

APPENDIX B

[Filed December 1, 1978]

IN THE SUPREME COURT
OF THE
STATE OF INDIANA

IN THE MATTER OF LENDALL B. TERRY	)))	CAUSE NO. 374 S 68

FINDINGS OF HEARING OFFICER PURSUANT TO A.D. RULE 23, SECTION 14(f)

The undersigned, heretofore appointed by this Honorable Court as Hearing Officer in the above-entitled cause under the provisions of Rule A.D. 23, respectfully reports as follows:

Preliminary Proceedings and Hearing

The Indiana Supreme Court Disciplinary Commission filed its Supplemental Verified Complaint For Disciplinary Action against the Respondent, Lendall B. Terry ("Respondent"), on July 13, 1977. Thereafter, the undersigned was appointed Hearing Officer and he qualified and assumed jurisdiction of these proceedings.

Following various preliminary matters and proceedings, this cause came on for final hearing before the Hearing Officer on June 21 and June 22, 1978. After the conclusion of the hearing, counsel were given an opportunity to file briefs after receipt of the transcript of the evidence.

The transcript of the evidence, all documentary evidence offered or admitted in evidence, and all other matters relating to this cause in possession of the Hearing Officer are transmitted herewith.

Action Upon Deferred Rulings

Three matters were taken under advisement by the Hearing Officer at the Hearing. Rulings are now made as follows:

(1) Commission's Motion to amend paragraph 2 of Count I of the Supplemental Verified Complaint to include the allegation that Respondent's conduct violated his oath as an attorney is GRANTED.

(2) Commission's Motion to strike all of Respondent's exhibits is DENIED.

(3) Respondent's Objection to offered Commission Exhibit 21 (Transcript of Zelmer Norman's Testimony in a custody hearing) is SUSTAINED and proffered exhibit is NOT ADMITTED.

Findings

Count I

1. On February 20, 1975, in this same cause, the Indiana Supreme Court handed down its "Opinion On Verified Complaint For Disciplinary Action" wherein a majority of the Supreme Court found the Respondent lacking in judicial temperament and unfit to occupy judicial office, as a consequence of which the Respondent was suspended without pay from the office of Judge of the Ripley Circuit Court. *In The Matter Of Terry* (1975), 262 Ind. 667, 323 N.E.2d 192.

2. The majority opinion of the Indiana Supreme Court was authored by Justice Donald H. Hunter of said Court.

3. The majority opinion of this Court, as well as the dissenting opinion, dealt with a finding regarding Respondent's actions as judge in pursuing the seeking of an indictment against a Batesville attorney, William Greeman, for an alleged forgery of an executrix's signature on a verified petition for allowance of fees (Def. Ex. A).

4. On June 10, 1975, Justice Hunter authored a majority opinion of the Indiana Supreme Court denying Respondent's Petition for Rehearing in this same cause. (Comm. Ex. 4)

5. Justice Hunter's prior involvement in matters pertaining to Respondent occurred (a) in 1973 when, as a member of the Indiana Supreme Court, the Supreme Court found Respondent guilty of contempt, and (b) on April 11, 1974, when as Acting Chief Justice, Justice Hunter signed on behalf of the Supreme Court (Arterburn, C. J., not participating) an Alternative Writ of Mandate and Prohibition (Def. Ex. T) in Cause No. 474 S 82, petitioned for the same day, by the then Prosecuting Attorney of Ripley County (the "relator"), commanding the Ripley Circuit Court and the Respondent, as the judge thereof, to grant a change of judge in an action filed to remove the relator as prosecuting attorney and appoint a special prosecuting attorney, and to refrain from interfering with the relator in the performance of his duties as prosecuting attorney, and (c) in October of 1974, at a dinner meeting in New Castle, Indiana between some invited State court judges, the Respondent included, and three Supreme Court justices, Justice Hunter presiding, at which the

Respondent felt Justice Hunter "zeroed in on me" because of Respondent's stated views on the change of judge rule.

6. On April 14, 1976, Respondent filed with the Indiana Supreme Court a petition to terminate his suspension without pay as Judge of the Ripley Circuit Court.

7. Shortly thereafter, and without probable cause to do so, the Respondent initiated an improper letter writing campaign designed to impugn the character and integrity of Justice Hunter.

8. As part of said campaign, the Respondent composed, signed and caused letters to be published and disseminated to various members of the Indiana bench and bar which accused Justice Hunter of using his judicial office to cover up Batesville Attorney Greeman's alleged forgery and to protect Greeman from prosecution.

9. The following are passages from certain of the letters disseminated by the Respondent:

(a) *Letter from Respondent to Honorable Robert R. Brown, Judge, Jackson Circuit Court, dated May 2, 1976*:

> "As you know I have asked you before to help me deal with the criminal conspiracy in the Ripley Circuit Court. William W. Greeman has committed several criminal offenses in the Court—conspiracy to commit forgery, false notarization and federal mail fraud. Because I would not ignore it, I am barred from office, deprived of my civil rights and the voters of Ripley County are denied their right to a Judge of their choice.
>
> "Indiana Supreme Court Justice Donald H. Hunter is protecting William Greeman from prosecution

for the State offenses and United States Attorney James B. Young is blocking the mail fraud case against Greeman.

"I am asking you now, Judge Brown, what is your position in these matters? Will you use your position in the Indiana Judges Association to help correct these abuses? Or will the Association condone them? Isn't impeachment of Hunter called for?"

(b) *Excerpts from Letter from Respondent to Honorable Wesley W. Ratliff, Jr., Judge, Henry Circuit Court, dated May 6, 1976*:

"You are both a Circuit Judge and President of the Indiana Judges Association. As you know, certain members of the Indiana Supreme Court declared me suspended from office without pay on February 20, 1975. I have accepted their suspension without public complaint in the hope that we could save the reputation of our State Judiciary. The conspiracy to protect the Batesville attorney that led to my suspension unfortunately continued unabated.

"It is my belief that less ultimate damage to the State Judiciary will result if we now take steps to bring the conspiracy to an end. Some prominent careers will inevitably be affected adversely. But I am sure you will agree that when anyone uses his judicial office to cover up crime his actions are indefensible."

(c) *Excerpts from Letter from Respondent to Judge Ratliff, dated June 1, 1976:*

"From the time we first discovered the forged documents filed by the politically prominent Batesville lawyer in the Ripley Circuit Court in late 1973, Indiana Supreme Court Justice Hunter has misused his official position to protect that lawyer from answering for his actions. That protection continues to this day unabated.

"Because I would not knuckle to corruption in the Circuit Court, Justice Hunter removed me from my elective judicial office, declared my salary forfeit, appointed his own 'judge' and gave that person my salary. Meantime, the lawyer who filed the forged documents in the Ripley Circuit Court continues to practice there with impunity. He is, seemingly, "untouchable" under Indiana Law.

"Donald H. Hunter has been, and continues to be, a corrupting influence on the Indiana Supreme Court and a protector of crime in the Ripley Circuit Court. Yet he has the gall to speak of 'judicial ethics'. Donald H. Hunter is unfit for judicial office and regardless of his threats of further punitive action against me and the citizens of Ripley County, I will not condone his judicial misconduct."

(d) *Excerpts from Letter from Respondent to Honorable Richard M. Givan, Chief Justice, Indiana Supreme Court, dated July 31, 1976:*

"In late 1973 William W. Greeman (appointive member of the State Judicial Task Force of the Indiana Criminal Justice Commission which supervises the annual disbursement of millions of dollars of Federal Law Enforcement Assistance Administration funds to state prosecutors, police and some courts—including the Indiana Supreme Court) repeatedly filed forged documents bearing his false notarization in the Ripley Circuit Court to obtain attorney fees from a decedent's estate for his law firm.

"When, as Ripley Circuit Judge, I discovered and challenged Greeman's actions, Indiana Supreme Court Justice Donald H. Hunter corruptly conspired with others to use his high judicial office to cover up Greeman's crimes and to protect Greeman from criminal prosecution. The essence of the plot was to use the Indiana Supreme Court Disciplinary Commission to harass, intimidate and discredit me as a witness. The coup de grace was to be my

removal from the office of Ripley Circuit Court Judge and my disbarment as a lawyer for 'at least five years'. Since I had done nothing illegal, I was charged with not having 'proper judicial temperament'.

"The preposterous scenario was slowed by the intensive organized effort of the volunteer nonpartisan Ripley County Citizens For Good Government and my own determination to fight to protect the integrity of the Ripley Circuit Court. But the attorney connivance and judicial collusion continued unabated. Donald H. Hunter was the central figure in the conspiracy. Then Chief Judge George B. Hoffman, Jr., was appointed as 'hearing officer' and Mark W. Gray was assigned to take over from John B. Ramming as 'counsel' for the Disciplinary Commission. Ramming left as Executive Secretary of the Commission the very next day after my hearing before Judge Hoffman ended.

"In furtherance of the conspiracy to protect William W. Greeman, Justice Hunter on February 20, 1975, ordered me removed 'instanter without pay' from the bench for 'lack of judicial temperament'. To further intimidate me as a witness to the Hunter-Greeman crime cover-up, Justice Hunter threatened me with disbarment and Judge Hoffman imposed a gag order forbidding my public discussion of the conspiracy. The removal action purported to rest upon considerations of 'judicial ethics'."

(e) *Excerpts from Letter from Respondent to Chief Justice Givan dated September 7, 1976:*

"The purpose of this letter is to petition you to direct Indiana Supreme Court Justice Donald H. Hunter to cease and desist from protecting crime in the Ripley Circuit Court at Versailles, Indiana. Justice Hunter for more than two years has been the leader of a conspiracy to protect William W. Greeman from indictment and prosecution for filing

with me as Ripley Circuit Judge forged documents bearing his false notarization to obtain money for his law firm at Batesville, Indiana.

"As Ripley Circuit Judge I have repeatedly furnished proof through official channels (including the Ripley County Prosecuting Attorney, the United States Attorney for the Southern Judicial District of Indiana, the Indiana Supreme Court, the United States Postal Service and the United States Department of Justice) that William W. Greeman has engaged in the crimes of conspiracy to commit forgery, false notarization and mail fraud, without Greeman ever being formally charged or prosecuted for any of those offenses.

"Highly placed Indiana officials have so far blocked the Federal prosecution of Greeman. Indiana Supreme Court Justice Donald H. Hunter has officially proclaimed that no forgery occurred and you, Mr. Chief Justice, on April 12, 1976, bluntly informed me that the matter is 'closed' and that 'no further action will be taken'. On February 20, 1975 Indiana Supreme Court Justice Donald H. Hunter removed me from my elective office as Ripley Circuit Judge and simultaneously confiscated my salary. Moreover, he then threatened me with further punitive action.

"(I)t seems to me that blackmail of an honest Circuit Judge by a State Supreme Court Justice should be sufficient basis for suspension and removal of that Supreme Court Justice from office pursuant to Article 7, Section 11, of the Constitution of Indiana. In any event, so long as a member of the Indiana Supreme Court continues to participate in a criminal conspiracy to cover up forgery by harassing and discrediting me as a Judge and a witness, nothing constructive can be accomplished by a hearing on my 'proper judicial temperament' conducted by his confederates.

"Again, Mr. Chief Justice, I ask you to direct Indiana Supreme Court Justice Donald H. Hunter, as well as George B. Hoffman and Mark W. Gray (your appointees) to cease and desist from covering up crime in the Ripley Circuit Court. I ask this in the name of Law and Justice and in behalf of the honest citizens of Ripley County."

10. The contents of the letter referred to above in Finding No. 9(c) were sent by Respondent to all of the officers of the Indiana Judges Association and to various law firms in Indiana which the Respondent considered to have "influence".

11. The letter referred to above in Finding No. 9(d) was sent to some representative(s) of the following: Indiana General Assembly, Governor of Indiana, Secretary of State of Indiana, Attorney General of Indiana, Judicial Qualifications Commission. Disciplinary Commission, Indiana Judges Association, Judicial Study Commission, Judicial Conference of Indiana, Indiana Judicial Center, Indiana State Bar Association.

12. The letter referred to above in Finding No. 9(e) was sent to the members of the Judicial Qualifications Commission.

13. Thereafter, on or about September 27, 1976, the Respondent prepared, signed and caused to be filed in this proceeding with the Clerk of the Indiana Supreme Court, his "Motion To Disqualify Justice Donald H. Hunter And For His Suspension From Judicial Office". The petition requested the immediate suspension of Justice Hunter from judicial office on the following alleged grounds:

"(1) Donald H. Hunter is engaged in an unlawful conspiracy to protect Batesville, Indiana lawyer William W. Greeman from criminal prosecution for

filing forged documents bearing Greeman's false notarization in the Ripley Circuit Court;

"(2) Donald H. Hunter in furtherance of that conspiracy has used his judicial office to influence the Indiana Supreme Court Disciplinary Commission to cover up crime in the Ripley Circuit Court and to harass and discredit the Ripley Circuit Judge as a witness to that crime;

"(3) Donald H. Hunter has caused false findings of fact to be made against the Ripley Circuit Judge in order to discredit that Judge as a witness to crime in the Ripley Circuit Court;

"(4) Donald H. Hunter has used his judicial office to deny the Ripley Circuit Judge his Federal Constitutional rights in order to protect crime in the Ripley Circuit Court;

"(5) Donald H. Hunter, for the foregoing reasons, is unfit to sit as a member of the Indiana Supreme Court in judgment of the Ripley Circuit Judge in this cause and is unfit to serve as a judicial officer."

14. As found above, the Respondent wholly lacked probable cause to make the above allegations against Justice Hunter. The Respondent, although given ample opportunity to do so, has not provided this Hearing Officer with any *facts* to substantiate his grossly disrespectful allegations against Justice Hunter. Respondent utterly failed to produce any evidence that would tie Justice Hunter into the convoluted theory of conspiracy Respondent contends Justice Hunter masterminded to protect Batesville attorney, William Greeman, from criminal prosecution of an alleged forgery that two separate grand juries, in 1974 and 1976, investigated and returned a "no indictment".

15. As justification for what this Hearing Officer finds to be false accusations against Justice Hunter, the

Respondent refers to those actions taken by Justice Hunter as a member of this Court, referred to in Findings 3, 4 and 5 hereof, including authoring the majority opinion which suspended him from judicial office.

16. The timing of Respondent's widely publicized accusations against Justice Hunter occurred shortly after Respondent filed his petition to terminate his suspension as judge of the Ripley Circuit Court and was designed to force Justice Hunter into disqualifying himself or being disqualified to consider Respondent's petition.

17. Regardless of whether or not Respondent believed the false accusations he leveled against Justice Hunter, his conduct exhibited a reckless disregard of the truth.

18. This Hearing Officer does not find credible Respondent's testimony of remarks made to him concerning Justice Hunter by the late Arch N. Bobbitt, Respondent's attorney, and a former justice of the Indiana Supreme Court. However, even if made, Judge Bobbitt's remarks, as related by Respondent, did not suggest a corrupt conspiracy between Justice Hunter and others (unnamed) to cover up Batesville attorney Greeman's alleged crimes, this being the conclusionary leap made by Respondent and then written and publicized by him as previously found. Respondent's actions in this regard are found to be retaliatory, motivated primarily by an inability to accept personal responsibility for any of his actions leading up to his suspension as the Ripley County judge, and by seeking vindication through vengeful written publications against those he falsely characterized as conspirators against him.

19. The Respondent's above conduct violated D.R. 1-102(A)(1) and 6 and D.R. 8-102B of the *Code of*

Professional Responsibility for Attorneys at Law ("Code") and his *Oath as Attorney*. The allegations made against Justice Hunter by the Respondent were so totally unfounded and so clearly in violation of the Code as to justify severe disciplinary action.

Count II

1. During the year 1975, James T. Hooper, a Lawrenceburg, Indiana, attorney, was associated in partnership in the practice of law with the Prosecuting Attorney of Dearborn County, Indiana, Joseph W. Votaw III.

2. Within a week prior to November 21, 1975, an Indiana State Policeman by the name of John T. Schwartz came to Hooper's home to converse with Hooper. Schwartz requested Hooper to take part in representing or helping him in connection with an Indiana State Police investigation of Schwartz's conduct.

3. Hooper had never represented Schwartz before and, on the occasion in question, Hooper advised Schwartz that his business relationship with Mr. Votaw precluded him from being actively engaged in any criminal matter or discussing Schwartz's problems with anyone.

4. On November 21, 1975, Hooper was in trial in the Jefferson Circuit Court and, during an afternoon recess, he was approached by the Respondent who said that he wanted to talk to Hooper about a matter. Hooper and the Respondent knew one another as Hooper had practiced law before the Respondent in Ripley County. The Respondent also knew that Votaw was the Prosecuting Attorney of Dearborn County, Indiana, although it is not known whether Respondent knew that Hooper and Votaw were law partners.

5. Later the same day, after Hooper concluded his matter in the Jefferson Circuit Court, the Respondent was waiting for Hooper in the corridor and the two of them adjourned to the Jefferson Circuit Court Jury Room. The Respondent told Hooper that he wanted to talk to Hooper about the "Schwartz matter", which had received newspaper publicity. Respondent did not represent Schwartz. Although Respondent denies that money was discussed, this Hearing Officer credits Mr. Hooper's testimony that Respondent volunteered that "there would be $1000.00 in it if something could be done to help Schwartz", or words to that effect. Hooper advised the Respondent that the two of them should not discuss the matter because Hooper had learned of the investigation regarding Schwartz, and Hooper and the Prosecuting Attorney were law partners.

6. On January 28, 1976, Schwartz was named as defendant in a twelve (12) count indictment issued by the Grand Jury of Dearborn County, signed and approved by Votaw, which indictment accused Schwartz of multiple thefts of State and County monies in an alleged scheme of sharing "fine monies" with a Dearborn County Justice of the Peace.

7. On February 19, 1976, the Respondent was indicted for bribery in connection with the aforesaid offer of $1000.00 to Hooper. The Respondent was acquitted of said charge on December 7, 1976, for the reason that there was "insufficient evidence" to sustain a criminal conviction of the offense charged.

8. There is insufficient evidence as to Respondent's knowledge that Hooper and Votaw were law partners or that Respondent knew of Schwartz's prior meeting with Hooper seeking representation and Hooper's reasons for refusing representation. Also, there is sufficient doubt as

to the meaning attributable to the credited statement concerning $1000.00, it possibly being the suggestion of a fee, and whether such statement was made before or after Hooper reminded Respondent that he and Votaw were law partners, to preclude any finding that Respondent attempted to enlist the aid and assistance of Hooper to corruptly influence Votaw in favor of Schwartz in the criminal investigation of Schwartz then being conducted by the Indiana State Police.

Count III

1. On or abut October 8, 1976, Judge Joseph L. Hensley, Judge Pro Tempore of the Ripley Circuit Court, attempted to qualify twelve (12) prospective grand jurors who had been summoned for Grand Jury duty by the Ripley Circuit Court.

2. During the impanelment proceedings, Judge Hensley learned that all of the prospective grand jurors had been previously contacted by the Respondent and given a packet of documents which some of them had scanned or perused.

3. The documents mentioned above were delivered under a cover letter signed by the Respondent as "Judge Ripley Circuit Court", addressed "To the Ripley Circuit Court Grand Jury" and captioned, "In re: Forgery in the Ripley Circuit Court." The letter states, in pertinent part, the following:

> "The purpose of this letter is to bring to your attention the crime of forgery. Forgery is a felony under Indiana Law. Enclosed is a copy of a forged document (Petition For Allowance Of Fees To Personal Representative And Attorney) filed in the Ripley Circuit Court on November 16, 1973. Enclosed also are the written reports of *three* separate

handwriting experts. These reports make it crystal clear that there is no doubt at all that the document in question bears the forged signature of Rosella Niles.

"The forged petition was filed by Attorney William W. Greeman of the Batesville, Indiana law firm of Wycoff, Greeman and Kellerman. It bears the false notarization of William W. Greeman. False notarization also is a crime under Indiana Law.

"The enclosures hereto include a five page letter from me to the Indiana Supreme Court dated 4 October 1976 setting forth the background of these crimes and how the persons who forged, notarized and filed the petition for fees have been protected from criminal prosecution. I respectfully urge you to read that letter with care."

4. The documents delivered with the above quoted cover letter consisted of copies of the following:

(a) The questioned petition for attorneys fees;

(b) A letter to the Respondent from Chief Justice Givan dated August 30, 1976, which included a letter to the Chief Justice dated August 26, 1976, from J. R. Dibowski, Director of the Cincinnati (Postal) Crime Laboratory, containing the latter's opinion that the questioned signature was a forgery;

(c) A letter dated May 10, 1974, from Joseph Tholl, of Peninsula, Ohio, an Examiner of Questioned Documents, to the Respondent, containing the former's opinion that the questioned signature was forged;

(d) The written opinion of Captain Douglas Buck, Indiana State Police, that the questioned signature "appears to be genuine" but that "obvious variations" exist in the two (2) capital letters;

(e) The Respondent's letter to Chief Justice Givan dated October 4, 1976, among many other things, disparaged Judge Hensley and the then

Prosecuting Attorney of Ripley County, John Schuerman, as follows:

"By that action William W. Greeman and his secretary Shirley Mae Hutson have been able so far to escape the legal consequences of preparing and filing forged documents in the Ripley Circuit Court in the *Kieffer* estate case. The Judge Pro Tempore of the Ripley Circuit Court is Joseph Hensley, an attorney of Madison, who was designated by the Indiana Supreme Court to serve as Judge. From the day Hensley was given my office and salary he has bowed to the wishes of William W. Greeman—beginning by restoring Greeman's notary seal (previously forfeited for unlawful use) and approving the closing of the *Kieffer* estate case in which Greeman had notarized and filed the forged petition for attorney fees. The other lawyer who sits as Judge Pro Tempore of the Ripley Circuit Court is Greeley Gay of Versailles, who continues to sit even though he was indicted by a Federal Grand Jury at Indianapolis on June 29, 1976.

"The Indiana Supreme Court refuses to permit this outrage to be corrected and continues to deny me my office and the citizens of Ripley County an honest Circuit Court.

"After receiving the foregoing from Chief Justice Givan (the Dibowski letter), I referred it to the Ripley County Citizens For Good Government committee. On Monday September 13, 1976 a delegation of forty-four Ripley County citizens appeared at the office of the Ripley County Prosecuting Attorney John Schuerman in the Court House at Versailles, Indiana to ask that the Ripley Circuit Court Grand Jury be convened to consider the matter. Prosecuting Attorney Schuerman refused to talk to the group but issued the following statement:

'I will not convene the Grand Jury as they have already investigated this. I have no reason to call the Grand Jury at this time. Captain Douglas Buck stated under oath during Terry's hearing in 1974 and during earlier Grand Jury proceedings that there was no forgery. I believe Captain Buck to be the best handwriting expert in Indiana and will stake my reputation on him.'

"The refusal of the current Ripley County prosecutor to act upon the evidence forwarded by Chief Justice Givan to the Ripley Circuit Judge leaves the forgery matter covered up as before. The honest citizens of Ripley County deeply resent this cover-up and the obstruction of Justice in the Ripley Circuit Court. The fact that it is a prominent Batesville lawyer who filed the forged petition for fees should not be a controlling factor if we have 'equal Justice under Law'."

5. The Respondent was not the presiding Judge of the Ripley Circuit Court when the above described letters and documents were delivered to the prospective grand jurors.

6. Judge Hensley found that the said prospective grand jury panel had been tampered with and he dismissed the entire panel, thereby causing delay and additional expense in convening the Ripley County Grand Jury.

7. This Hearing Officer finds that Respondent's extraordinary actions in contacting members of the prospective grand jury in October of 1976 concerning an alleged forgery occurring almost three years earlier, in November of 1973, were not motivated primarily out of a concern to expose criminal activity, but, instead, was part of Respondent's effort to seek personal vindication.

Less than a month before Respondent contacted the prospective grand jurors, on September 14 to 16, 1976, a hearing on Respondent's petition to terminate his suspension as judge was heard before Hearing Officer Hoffman; and on September 27, 1976, Respondent had filed his motion with the Indiana Supreme Court to disqualify Justice Hunter and for his immediate suspension from judicial office. (Comm. Ex. 13)

8. The aforesaid conduct of the Respondent in communicating with the grand jury venire and in effect advising such venire without probable cause that Judge Hensley and the Prosecuting Attorney, John Schuerman, were participating in the cover-up of the crime of forgery and obstructing justice in the Ripley Circuit Court, violated the spirit of D.R. 7-108 and the letter of D.R. 1-102(A)(1), (5), and (6) of the Code. Such conduct also violated Respondent's *Oath as Attorney*.

Count IV

1. The Respondent represented one Doris Jean Norman in a child custody matter following a dissolution of marriage, which custody matter was pending before the Ripley Circuit Court in the year 1977 as Cause No. D-75-21.

2. Zelmer Norman, the former husband of Doris Jean Norman, was represented in the aforesaid cause by attorney William Wilson of Lawrenceburg, Indiana.

3. At all times relevant to this count the Respondent knew that Zelmer Norman was represented by Wilson.

4. Respondent admits having an unscheduled meeting with Zelmer Norman on January 27, 1977, when Norman approached Respondent in the public

library and asked to talk, but denies at this or any other time discussing with Norman the custody of Norman's daughter. Zelmer Norman, although summoned to appear by the Disciplinary Commission, did not appear at the hearing in this cause. Norman's prior testimony in the custody hearing on March 2, 1977 in Cause No. D-75-21 was not admitted or considered by this Hearing Officer.

5. No violation of the allegations against Respondent in Count IV of the Supplemental Verified Complaint for Disciplinary Action is found to exist.

Dated this 1st day of December, 1978.

/s/ Henry C. Ryder

Henry C. Ryder
Hearing Officer

APPENDIX C

IN THE SUPREME COURT
OF THE
STATE OF INDIANA

IN THE MATTER OF)
) SS: CAUSE NO. 374 S 68
LENDALL B. TERRY)

SUPPLEMENTAL VERIFIED COMPLAINT FOR DISCIPLINARY ACTION

The Disciplinary Commission of the Supreme Court of Indiana, having found reasonable cause to believe the Respondent's acts, if proven, would warrant further disciplinary action, by its Executive Secretary, Sheldon A. Breskow, pursuant to Ind. R. A.D. 23, Section 12, files and presents this Supplemental Verified Complaint against Lendall B. Terry, heretofore admitted to the Bar of the State of Indiana on December 4, 1952.

In the case of *In Re Terry* (1975) 262 Ind. 667 the Indiana Supreme Court specifically found the Respondent has violated Rules 1, 2, 3, 8, and 10 of the *Code of Judicial Conduct and Ethics*. For said violations, the Respondent was suspended without pay from the office of Judge of Ripley Circuit Court. That in footnote 3 of *In Re Terry* 262 Ind. 667 at 671 the court reserved jurisdiction by noting:

> In view of the disposition of the matter, we believe that the public interest does not *at this time* require further disciplinary action against respondent as a member of the bar, although the hearing officer found violations of Disciplinary Rules 1-102(A) (4)

(5) and (6) of the Code of Professional Responsibility. *He is subject to both.*

The Disciplinary Commission, by its Executive Secretary, alleges that Respondent's conduct subsequent to the decision in *In Re Terry, supra,* as set forth in counts one through four of this Supplemental Verified Complaint now requires, in the public interest, further disciplinary action and a final disposition on the hearing officer's findings relative to the Respondent's violations of D.R. 1-102(A) (4) (5) and (6). The Respondent's conduct as a member of the bar subsequent to the decision in *In Re Terry, supra,* is as follows:

Count I

1. That the Respondent, Lendall B. Terry, since his suspension without pay from the office of Judge of the Ripley Circuit Court, *In re Terry* (1975), 262 Ind. 667, has initiated and continued an improper and malicious campaign designed to impugn the character and integrity of Justice Donald Hunter, a member of the Indiana Supreme Court and author of the majority opinion in *In re Terry,* supra.

2. That the Respondent, Lendall B. Terry, as part of said campaign composed, signed, and caused to be published numerous letters addressed to various members of the Indiana bench and bar accusing Justice Hunter, among other things, of using his judicial office, (a) to cover up criminal activity to-wit: an alleged forgery by attorney William Greeman, of Batesville, Indiana, and (b) to protect Greeman from prosecution.

3. That the following passages from a sample of the letters disseminated by the Respondent typify the accusations made by the Respondent against Justice Hunter:

> Indiana Supreme Court Justice Donald H. Hunter is protecting William Greeman from prosecution of the State offenses . . .

(Excerpt from a letter dated May 2, 1976, addressed to Judge Robert R. Brown, Judge of the Jackson Circuit Court.)

> . . . Indiana Supreme Court Justice Donald H. Hunter corruptly conspired with others to use his high judicial office to cover up Greeman's crimes and to protect Greeman from Criminal prosecution.

(Excerpt from a letter dated July 31, 1976, addressed to Chief Justice Richard M. Givan. This letter is captioned *Judicial Protection of Attorney Crime in Ripley Circuit Court* and shows copies were sent to: Indiana General Assembly, Governor of Indiana, Secretary of State of Indiana, Attorney General of Indiana, Judicial Qualifications Commission, Disciplinary Commission, Indiana Supreme Court, Board of Managers, Indiana Judges Association, Judicial Study Commission, Judicial Conference of Indiana, Indiana Judicial Center, Board of Managers, Indiana State Bar Association.)

> Justice Hunter for more than two years has been the leader of a conspiracy to protect William W. Greeman from indictment and prosecution . . .

(Excerpt from a letter dated September 7, 1976, addressed to Chief Justice Richard M. Givan. This letter is captioned *Judicial Cover Up of Forgery* and shows copies were sent to: Judicial Qualifications Commission and Disciplinary Commission, Indiana Supreme Court.)

4. That any and all of the accusations made by the Respondent in his various letters charging Justice Hunter with participating in a conspiracy to cover up criminal activity were false and were known to be false by the Respondent when he made them.

5. That on March 23, 1977, the Indiana Supreme Court issues a Per Curiam Opinion on the Respondent's Petition to Terminate Suspension Without Pay in the case of *In The Matter of Lendall B. Terry, Judge of the Ripley Circuit Court*, Cause Number 374 S 68.

6. That the Court in said opinion denying the Respondent's petition adopted the following Finding of Fact submitted by the Hearing Officer:

> That said petitioner distributed over two thousand letters addressed to the Chief Justice of Indiana, said letter being D.C. Exhibit "7" making false and misleading accusations against various judges and attorneys.
>
> That petitioner still bears malice and animosity toward certain lawyers in Ripley Court, toward Justice Hunter because he was the author of the opinion of the Supreme Court in *In Re Terry* (1975) 323 N.E. 2d 192, and toward those who do not agree with the petitioner.
>
> That no evidence of any kind whatsoever of wrongdoing on the part of Justice Hunter was presented except the unsupported statements of the petitioner.

7. That such conduct by the Respondent, in his capacity as an attorney, was improprietous, and indicative of bad behavior and said conduct violated: (1) D.R. 8-102(B) in that, Respondent knowingly made false accusations against a judge; (2) D.R. 1-102(A)(1) and (6) in that, Respondent's conduct adversely reflects on his fitness to practice law.

Count II

1. That on or about November 21, 1975, the Respondent improperly promised and offered the sum of One Thousand Dollars ($1,000.00) to James T. Hooper for the

purpose of having Hooper influence Joseph Votaw III, the then prosecuting attorney for the Seventh Judicial Circuit and Hooper's law partner, with respect to his official duties as prosecuting attorney in a matter pending before him, to-wit: the prosecution of John T. Schwartz for the crime of theft in Dearborn County, Indiana.

2. That the Respondent was indicted on February 19, 1976 for bribery in connection with the said offer of $1,000 to Hooper. That the Respondent was acquitted of said charge on December 7, 1976 for the reason that there was insufficient evidence to sustain a conviction of the offense charged.

3. That on March 23, 1977, the Indiana Supreme Court issued a Per Curiam opinion on the Respondent's Petition to Terminate Suspension Without Pay in the case of *In The Matter of Lendall B. Terry, Judge of the Ripley Circuit Court*, Cause Number 374 S 68.

4. That the Court in said opinion denying the Respondent's petition adopted the following Finding of Fact submitted by the Hearing Officer:

> That the petitioner contacted attorney James T. Hooper, Sr. and offered him $1,000.00 to keep an indictment from being returned against a certain police officer.

5. That such conduct by the Respondent, in his capacity as an attorney, notwithstanding the aforementioned acquittal on the bribery charge, was improprietous and indicative of bad behavior and said conduct violated: (1) D.R. 7-110(b) in that, the Respondent attempted to cause another to communicate as to the merits of a cause which was pending before a public official; (2) D.R. 1-102(A)(1) through (6) in that, Respondent's conduct was an attempt to circumvent a Disciplinary rule through actions of another, was conduct involving dishonesty and

fraud, was conduct prejudicial to the administration of justice and said conduct adversely reflects on his fitness to practice law.

Count III

1. That on or about October 8, 1976, Judge Joseph L. Hensley, Judge Pro Tempore of the Ripley Circuit Court, attempted to qualify twelve (12) prospective grand jurors who had been summoned for Grand Jury duty by the Ripley Circuit Court.

2. That as Judge Hensley attempted to qualify the prospective grand jurors, he was informed by them that each had been personally contacted and given a packet of papers by the Respondent.

3. That the packet of papers contained documents that referred to a matter which the Respondent asserted should be the subject of the Grand Jury's investigation to-wit: an alleged forgery and conspiracy.

4. That one of the documents contained in the said packet of papers was the following letter dated October 5, 1976, and signed by the Respondent:

Osgood, Indiana 47037
5 October 1976

TO THE RIPLEY CIRCUIT COURT GRAND JURY:

In re: *Forgery in the Ripley Circuit Court*

You members of the Ripley Circuit Court Grand Jury have been selected by the Jury Commissioners to serve during the fourth quarter of 1976. Under the Law of Indiana it is your duty to inquire into crime in Ripley County and to return an indictment

where probable cause exists to believe a specific crime has been committed by a known person or persons.

The purpose of this letter is to bring to your attention the crime of forgery. Forgery is a felony under Indiana Law. Enclosed is a copy of a forged document (Petition For Allowance Of Fees To Personal Representative And Attorney) filed in the Ripley Circuit Court on November 16, 1973. Enclosed also are the written reports of three separate handwriting experts. These reports make it crystal clear that there is no doubt at all that the document in question bears the forged signature of Rosella Niles.

The forged petition was filed by Attorney William W. Greeman of the Batesville, Indiana law firm of Wycoff, Greeman and Kellerman. It bears the false notarization of William W. Greeman. False notarization also is a crime under Indiana law.

The enclosures hereto include a five page letter from me to the Indiana Supreme Court dated 4 October 1976 setting forth the background of these crimes and how the persons who forged, notarized and filed the petition for fees have been protected from criminal prosecution. I respectfully urge you to read that letter with care.

Although it has been suggested that the Indiana State Police handwriting analyst, Captain Douglas Buck, found there was "no forgery", you can quickly see for yourselves from Captian Buck's enclosed signed report of January 7, 1974 that he does not say "no forgery". Instead he says "obvious variations exist". Most forgeries "appear genuine" but Captain Buck's report explains the "obvious variations". He does not say the signature in question is genuine as he does say of the three others he examined at the same time.

The two other handwriting experts are Joseph Tholl, 806 West Streetsboro Road, Peninsula, Ohio

44264, who works for the Cleveland, Ohio Police Department and Director James R. Dibowski of the Cincinnati Crime Laboratory of the United States Postal Service at Cincinnati, Ohio. The enclosed report of Joseph Tholl, dated May 1[illegible], 1974 sets forth in great detail the precise re[illegible]ns for his conclusion that the signature of Rosella Niles was forged.

Director Dibowski of the United States Postal Service says in his enclosed letter of August 26, 1976 to Chief Justice Givan of the Indiana Supreme Court that:

> I shall be pleased to present expert testimony before you, or any body, or any court concerning the document presented in Judge Terry's court which I found to be a forgery. I would bring with me enlarged photographic illustrations which I am positive would convince even a skeptic of the forgery.

In order that Justice may be done in this matter involving a forgery filed in the Ripley Circuit Court, I respectfully urge you to *accept Director Dibowski's offer to come from Cincinnati and testify before the Ripley Circuit Court Grand Jury.*

Other witnesses who have first hand knowledge about this matter are: (1) Lendall B. Terry; (2) William W. Greeman; (3) Shirley Mae Hutson who is secretary to Mr. Greeman; (4) Rosella Niles; (5) Joseph Tholl; and (6) Douglas Buck.

I am ready and willing to appear before you and testify under oath in detail about this matter. Director James R. Dibowski, the Federal handwriting expert from Cincinnati, is also ready and willing to appear before you to testify about his findings of forgery. Is it not time that the truth in this unfortunate matter be permitted to come out instead of being covered up and ignored? If the Ripley Circuit Court Grand Jury does not bring out the truth, then

who will? I will cooperate fully with you in every way to secure Justice in this case.

Respectfully yours,
/s/ Lendall B. Terry
LENDALL B. TERRY, Judge
Ripley Circuit Court

5. The Respondent, Lendall B. Terry, was not the presiding Judge of the Ripley Circuit Court when said letter and documents were delivered to the prospective grand jurors and had no authority to instruct or advise them.

6. That as a result of the Respondent contacting the prospective grand jurors and furnishing them with the said packet of papers, Judge Hensley found that the prospective panel of October 8 had been tampered with and he dismissed the entire panel of prospective grand jurors.

7. That this dismissal and the ordering of a new panel of prospective grand jurors who were to appear for service on October 19, 1976, caused a delay in convening the Grand Jury.

8. That such conduct by the Respondent, in his capacity as an attorney, was improprietous and indicative of bad behavior and said conduct violated: (1) D.R. 7-108(A) in that, the Respondent improperly communicated with persons he knew to be members of a venire from which a Grand Jury was to be selected; (2) D.R. 1-102(A)(1)(5) and (6), in that, Respondent's conduct in tampering with the prospective grand jurors was prejudicial to the administration of justice and adversely reflects on his fitness to practice law.

Count IV

1. That Respondent represented Doris Jean Norman in a child custody matter, Cause Number D-75-21, which was pending before the Ripley Circuit Court.

2. That Zelmer Norman, Doris Jean Norman's ex-husband, was represented in the same custody matter by William Wilson, an attorney.

3. That at all times relevant to this count the Respondent knew that Zelmer Norman was represented by Wilson.

4. That Respondent caused Roland Crum, an Osgood banker, to contact Zelmer Norman for the purpose of arranging a meeting between the Respondent and Norman.

5. That on or about January 24, 1977, Roland Crum advised Norman of Respondent's desire to meet with him.

6. That on or about January 27, 1977, at approximately 3:00 p.m. Zelmer Norman went to the Respondent's office.

7. That at the January 27, 1977 meeting, Respondent interrogated Norman for over six (6) hours concerning the child custody matter which was still pending before the court.

8. That Respondent at said meeting did not advise Norman that his counsel (Wilson) should be present although the Respondent knew Norman was represented by counsel and the purpose of the meeting was to discuss a possible settlement of the custody issue.

9. That when Respondent's offer to settle was declined by Norman, the Respondent attempted to intimidate Norman into a settlement by threatening to embarrass him in Court.

10. That such conduct by the Respondent, in his capacity as an attorney, was improprietous, and indicative of bad behavior and said conduct violated: D.R. 7-104(A)(1), in that, Respondent during the course of his representation of a client communicated on the subject of the representation with an adverse party he knew to be represented by a lawyer without the prior consent of the lawyer representing such other party; D.R. 1-102(A)(1), (2), (5), and (6), in that, Respondent circumvented a disciplinary rule through actions of another and engaged in conduct that was prejudicial to the administration of justice and adversely reflected on his fitness to practice law.

Wherefore, the Executive Secretary prays that the said Lendall B. Terry be disbarred, or otherwise disciplined as is warranted, for professional misconduct, and that the Executive Secretary be ordered to prepare and submit to the Court an itemized statement of expenses allocable to this case incurred in the course of investigation, hearing, and review procedures pursuant to Ind. R. A.D. 23, Section 16; and that the Court order the Respondent to pay such expenses to the Clerk of this Court.

/s/ Sheldon A. Breskow
Executive Secretary
Indiana Supreme Court
Disciplinary Commission

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Sheldon A. Breskow, being duly sworn upon his oath, deposes and says that he is the Executive Secretary of the Disciplinary Commission of the Supreme Court of Indiana, appointed pursuant to Ind. R. A.D. 23, Section 8(a); that he makes this affidavit as Executive Secretary of the Disciplinary Commission; and that the facts set forth in the above and foregoing Supplemental Complaint are true as he is informed and believes.

/s/ Sheldon A. Breskow

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 13th day of July, 1977.

Bernice Velvick, Notary Public

My commission expires:
June 20, 1981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-887

LENDALL B. TERRY,
Petitioner,
vs.
INDIANA SUPREME COURT
DISCIPLINARY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT, INDIANA SUPREME COURT DISCIPLINARY COMMISSION, IN OPPOSITION

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Disciplinary Commission

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I.
Opinion Below

The Indiana Supreme Court Disciplinary Commission agrees that the opinion below is correctly set forth as Appendix A to the Petitioner's brief.

II.
Statement of Jurisdiction

The Respondent disagrees with the Petitioner's summary of the reasons why the Petitioner was disbarred

in the disciplinary proceeding below, it being the belief of the Respondent that such summary is incomplete. The opinion of the Supreme Court of the State of Indiana speaks for itself as to the factual and legal basis for the disbarment order. Otherwise, the jurisdictional requisites are adequately set forth in the Petition.

III.
Question Presented

The Respondent disagrees with the Petitioner's statement of the question presented by this Petition.

The decision and opinion of the Supreme Court of Indiana disbarring the Petitioner, as well as the Petition for Writ of Certiorari and accompanying Appendix filed by the Petitioner, give rise in the opinion of the Respondent to the following question:

(1) Whether an Indiana attorney may be disbarred or otherwise disciplined by the Indiana Supreme Court as a consequence of his making false accusations of criminal conduct against a Justice of the Indiana Supreme Court, which accusations were made without probable cause or legal proof, and which accusations exhibited a reckless disregard of the truth, and which accusations were designed to require the disqualification of such Justice from considering the attorney's then pending petition before such Court to be reinstated to the office of the Circuit Judge.

IV.
Constitutional Provisions, Statutes And Court Rules Involved

The Petitioner has fairly summarized those provisions of the various Constitutional provisions, statutes and Court rules he claims have application to the questions presented. Respondent, for its part, would additionally draw to the Court's attention the following pertinent provisions of

Ethical Consideration 8-6 of the *Indiana Code of Professional Responsibility for Attorneys at Law:*

> "Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified."

V.
Statement Of The Case

The Petitioner's statement of the case adequately and concisely summarizes the facts material to the consideration of the question presented.

VI.
Reasons For Denying The Writ

The Petitioner's sole posture in this Court is that the First Amendment wholly immunizes an attorney at law from making false accusations of criminal conduct against a Justice of the Supreme Court of Indiana. The Petitioner erroneously, and without support from the record, asserts that the charges made by the Petitioner against the Justice were made "with a reasonable belief that those charges were true". See Petitioner's brief, p. 17. The opinion below, which adopted *in toto* the findings of its Hearing Officer, makes abundantly clear that the Petitioner possessed no reasonable belief that the charges he was making were true. In this connection, the Hearing Officer found as follows with respect to the Petitioner's claim that his conduct was motivated by a reasonable belief:

"14. As found above, the Respondent wholly lacked probable cause to make the above allegations against Justice Hunter. The Respondent, although given ample opportunity to do so, has not provided this Hearing Officer with any *facts* to substantiate his grossly disrespectful allegations against Justice Hunter. Respondent utterly failed to produce any evidence that would tie Justice Hunter into the convoluted theory of conspiracy Respondent contends Justice Hunter masterminded to protect Batesville attorney, William Greeman, from criminal prosecution of an alleged forgery that two separate grand juries, in 1974 and 1976, investigated and returned a 'no indictment'.

"15. As justification for what this Hearing Officer finds to be false accusations against Justice Hunter, the Respondent refers to those actions taken by Justice Hunter as a member of this Court, referred to in Findings 3, 4 and 5 hereof, including authoring the majority opinion which suspended him from judicial office.

"16. The timing of Respondent's widely publicized accusations against Justice Hunter occurred shortly after Respondent filed his petition to terminate his suspension as judge of the Ripley Circuit Court and was designed to force Justice Hunter into disqualifying himself or being disqualified to consider Respondent's petition.

"17. Regardless of whether or not Respondent believed the false accusations he leveled against Justice Hunter, his conduct exhibited a reckless disregard of the truth."

See Petitioner's brief, Appendix B, pp. A-17 to A-18. The Petitioner has made no effort in his petition to demonstrate that the record of this proceeding fails to wholly support the above findings of the Hearing Officer and Court. Thus, the First Amendment issue raised by the Petitioner in this cause must be considered against the backdrop of the above undisputed facts.

The Petitioner's brief before this Court glaringly omits reference to the substantial body of substantive law which has developed during the past century regarding the discipline of attorneys at law for improper criticism of judicial conduct. The petition is incorrectly premised on the assumption that the Petitioner's actions must be judged solely by the law applicable to defamation cases generally rather than by the standards of conduct which govern attorneys at law in Indiana and elsewhere.

The Respondent's actions in this case were judged by the Supreme Court of Indiana in the light of the provisions of the *Indiana Code of Professional Responsibility for Attorneys at Law* and by the Petitioner's *Oath as Attorney*.

Disciplinary Rule 8-102(B) of the Code provides that:

> "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

The Ethical Considerations of the Indiana Code constitute a body of principles upon which the lawyer can rely for guidance in many situations, including the one presently before this Court. Ethical Consideration 8-6 states, in part:

> "Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified."

The Respondent's *Oath as Attorney* provides in pertinent part:

> "I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to

me to be unjust...and never seek to mislead the court or jury by any artifice or false statement of fact or law...I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest."

The above quoted Disciplinary Rule and Ethical Considerations for attorneys at law are neither novel nor new. They are an embodiment of the former Canon 1 of the *Canons of Professional Ethics of the American Bar Association* which read as follows:

"It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected."

As Justice Stewart stated in the case of *In Re Sawyer* (1959), 360 U.S. 622, 79 S.Ct. 1376, 1388, 3 L.Ed.2d 1473, 1489:

"A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.

"Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." (Emphasis added)

A lawyer, acting in a professional capacity, has fewer rights of free speech than would a private citizen. As was explained in *In Re Woodward* (Mo., 1957), 300 S.W.2d 385:

"Neither the right of free speech nor the right to engage in 'political' activities can be so construed or extended as to permit any such liberties to a member of the bar; respondent's action was in express and exact contradiction of his duties as a lawyer. *A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics; and if he wishes to remain a member of the bar he will conduct himself in accordance therewith."* (Emphasis added)

Attorneys should always be free to criticize the law, but attorneys traditionally have not been permitted, without just cause, to criticize the motives, integrity or competency of judges. In the case of *Attorney General v. Nelson* (1933), 263 Mich. 686, 249 N.W. 439, the Court said:

"Courts generally recognize that the public, and this includes the attorneys, has the right to criticize their opinions, and such criticism, when fairly indulged in, does not subject an attorney to discipline by the court, but such criticism must not go so far as to attack the integrity of the judge who has rendered the decision. ***'but this privilege does not carry with it the right to charge fellow attorneys and the presiding judge with conspiracy and corruption, when there is no adequate basis for such a charge. In re Mains, 121 Mich. 603, 610, 80 N.W. 714, 717'."

In *State ex rel. Florida Bar v. Calhoon* (1958), ____ Fla. ____, 102 S.2d 604, a case wherein an attorney had falsely accused a judge of gross misconduct, the Florida court said:

"It would be contrary to every democratic theorem to hold that a judge or a court is beyond bona fide comments and criticisms which do not exceed the bounds of decency and truth or which are not aimed at the destruction of public confidence in the judicial system as such. However, when the likely impairment of the administration of justice is the direct produ

false and scandalous accusations then the rule is otherwise. 5 Am.Jur., Attorneys at Law, Sec. 266, p. 420."

The general principles outlined above have *not* been modified by the rule of *New York Times Co. v. Sullivan* (1964), 376 U.S.254, 84 S.Ct. 710, 11 L.Ed.2d 686, or its progeny. As the Second Circuit Court of Appeals had occasion to observe in the case of *In Re Whiteside* (1967), 386 F.2d 805, at page 806, footnote 4:

"4. Appellant suggests that the rule of New York Times Co. v. Sullivan, 376 U.S.254, 84 S.Ct. 710, 11 L.Ed2d 686 (1964), immunizes him from disciplinary proceedings for his misconduct in persisting to make broadside attacks of grossly disrespectful proportions. We need not decide whether the New York Times rule applies to disciplinary proceedings against a lawyer for statements made in the course of litigation since, in any event, the allegations made by appellant would not be protected under that rule. The appellant, although given the opportunity to do so, adduced no facts to support his claim that the judges who ruled against his clients were conspiring to conceal the facts concerning an alleged murder. Surely to make such accusations—with no facts to substantiate them—simply because the judges ruled against his clients, exhibits a reckless disregard of the truth which would preclude protection under the rule of New York Times."

Unfounded criticism of judicial acts by attorneys at law has been the subject of a number of reported cases. See, e.g., the numerous cases collected at 7 Am.Jur.2d, *Attorneys at Law*, §9, and Annot., Attorney's Criticism of Judicial Acts as Ground of Disciplinary Action, 12 A.L.R.3d 1408, and 27 L.Ed.2d 953. The following discussion focuses upon several of such reported cases which in the opinion of the Respondent are pertinent to the issues before this Court.

The case of *In Re Glenn* (1964), 256 Iowa 1233, 130 N.W.2d 672, was a disciplinary action against a practicing Iowa attorney. Glenn had printed and circulated a leaflet

stating that a municipal judge proved not only that justice was blind but was also deaf and dumb, and that the subject municipal judge wished to deny litigants fair trial on appeals. Glenn had also accused the municipal court judge of being subject to the control of certain city and county officials. Glenn claimed that he was within his right of free speech to criticize the court and to speak fully regarding judicial acts and conduct. Glenn did not have any proof, other than his own unsupported suspicions, of his allegations. The Iowa Supreme Court ruled as follows:

"We have no hesitancy in finding that the leaflet went much farther than the accused, as a lawyer, had a right to go. He offered no evidence that Judge Dullard was ordered to prevent an appeal, or that he was under the control of any outside officials. We have no occasion to pass upon the question whether if he had been able to prove his charges the publication would have been justified; although if he had such evidence, proper ways were available to him to obtain a remedy. The entire publication evidences a desire on the part of the accused to belittle and besmirch the court and to bring it into disrepute with the general public. The trial court properly found it reprehensible, and acted accordingly." 130 N.W.2d at 676.

The case of *In Re Meeker* (1966), 76 New Mexico 354, 414 P.2d 862, involved a New Mexico attorney who had charged that three Justices of the New Mexico Supreme Court had conspired to deny him a fair and impartial review in a suit which he had brought in his own behalf and that they had misstated and distorted the facts so as to allow the cause to fail on a legal technicality. The New Mexico Supreme Court held that the Oath of an attorney is a solemn and sacred obligation, not to be lightly dealt with or disregarded. The Court further stated that the Canons of professional ethics must be enforced and respected by members of the bar if public confidence in the integrity and impartiality of the administration of justice was to be maintained.

The case of *In Re Whiteside, supra,* bears certain similarities to the proceeding before the Court in this case. The subject case was an appeal from an order of the Federal District Court for the District of Connecticut disbarring Whiteside from practice before that Court. Whiteside had filed a complaint in District Court charging a conspiracy between a group of lawyers, a State's attorney, a Deputy Coroner, and various Connecticut judges, including all five judges of the Connecticut Supreme Court of Errors. Whiteside's contention was that numerous Connecticut judges had entered into a conspiracy to conceal a murder by the actions taken by such judges in connection with litigation pending before them. The Court affirmed the order of disbarment and held that the grossly disrespectful allegations, repeatedly made, were so totally unfounded and so clearly in violation of professional ethics as to justify disbarment.

The case of *In Re Frerichs* (1976), ____ Iowa ____, 238 N.W.2d 764, involved a disciplinary proceeding instituted against an attorney who, in filing a petition for rehearing before the Iowa Supreme Court for a client, asserted that the Supreme Court had engaged in conduct amounting to fraud and deceit in its review of the factual record and in its decision. The Iowa Supreme Court found that Frerichs' conduct violated both his Oath as an attorney and Disciplinary Rule 8-102(B) of the Iowa Code of Professional Responsibility. The Court held that Frerichs' charges against it alleged, in substance, the commission of state and federal criminal offenses and attributed to the Court sinister, deceitful and unlawful motives and purposes. The Court further found that such charges, recklessly made, were not protected by freedom of speech guarantees and were the proper subject of disciplinary action.

The case before this Court presents a classic case of an attorney making false and slanderous accusations against a judicial officer without probable cause and without any reasonable belief in the accuracy of the statements. The

Petitioner has not shown this Court even a single fact or circumstance that would even have remotely suggested to a reasonable person that the subject Justice of the Indiana Supreme Court knowingly had committed illegal conduct. The Respondent clearly violated his *Oath as Attorney* and the *Indiana Code of Professional Responsibility for Attorneys at Law* when he made grossly disrespectful and slanderous allegations against a Supreme Court Justice in connection with a matter that was then pending before the Supreme Court of Indiana for adjudication. The Petitioner was bound by the ethical precepts of his profession and such precepts, under the facts and circumstances shown by the record in this case, required his abstention from making the subject allegations of alleged criminal misconduct.

VII.
Conclusion

The decision below is correct. For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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